Supreme Court, U.S.
FILED
JUN 17 1994
OFFICE OF THE CLERK

(3)

No. 93 - 1846

In the Supreme Court

of the

United States

October Term, 1993

DENNIS MARK, *et al.*,
Cross-Petitioners,

vs.

MICHELLE CORWIN, *et al.*,
Cross-Respondents

==========

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

==========

AMICUS CURIAE BRIEF IN SUPPORT OF
CROSS-PETITION FOR WRIT OF *CERTIORARI*

==========

Bartholomew Lee
327 Filbert Steps
San Francisco, CA 94133
(415) 788-4072

Attorney for *Amici*

Supreme Court, U.S.
FILED
JUN 17 1994
OFFICE OF THE CLERK

13 pp

TABLE OF AUTHORITIES:

Committee to Prevent Municipal Bankruptcy v. Renne (1/20/1994) __ FSup ___: 4

Eu v. Democratic Pty. Cent. Comm. (1989) 489 US 214: 10

Near v. Minnesota (1930) 283 US 697: 11

Renne v. Geary (1991) 501 US 312: *passim.*

SEIU v. FPPC (1992) 955 F2d 1312: 5

Thorsted v. Gregorie (2/10/1994) __ FSup ___: 4

Wong v. Bd. of Supervisors / Goland (4/8/1994), San Francisco Superior Ct. No. 959812: 7

Wong v. Bd. of Supervisors / Ventresca (9/3/1993), San Francisco Superior Ct. No. 9545, appeal pending: 6

AMICUS BRIEF IN FAVOR OF CROSS-PETITION FOR WRIT OF *CERTIORARI*:

Amici curiae respectfully ask that a writ of *certiorari* be issued as asked by Cross-Petitioners in ***Mark v. Corwin***.

This request is made, not only as speakers and hearers of speech, but also as citizens who want to exercise their right to petition for redress of grievances at the ballot box as fully-informed citizens who have not been deprived of the basic information of the American political system, namely the opinions of political parties, campaign committees and other electoral advocates, regarding candidates and issues.

Amici have a vital interest in this case, as contributors of ballot arguments concerning local measures, as members or officials of various political parties, as past and future candidates for non-partisan office and as voters.

What is ultimately at stake is ***the republican form of government*** which the Constitution guarantees to the people of each state. Representative government means above all that power comes from elections measuring the will of the people. This is undercut if the voters' decisions as to what endorsements or arguments are true or relevant, are made for them by government officials acting to reduce the flow of information to them by deleting from voter-pamphlets those endorsements or arguments which the officials consider false or irrelevant.

Such paternalistic censorship has the purpose and effect of making voters less aware of the disfavored opinions. If officials have *any* right to censor opinions they disapprove of, there is no limit to that right. The resulting ignorance is at least as inconsistent with a republican form of government, as monarchy ever was.

The kinds of censorship at issue in ***Mark v. Corwin*** are particularly harmful to those whose political positions are relatively less well-known or whose campaigns are relatively poorly-financed, who therefore are especially dependent on equal access to the publicly-financed voter-pamphlets where the challenged censorship occurs.

Most importantly, ***Renne v. Geary*** **(1991) 501 US 312** has created doubts as to whether *Amici* - or anyone else - even have standing to complain of this censorship.

As will be explained, lower courts are construing *Renne* in very different ways. Of four cases published or now on appeal, a district court and a 9th Circuit case apparently found voters generally have standing to challenge election-speech restrictions, while another district court and another 9th Circuit case apparently found voters generally *don't*.

The Court should take this opportunity to clarify whether *Renne* was intended to make major changes in longstanding principles of federal constitutional jurisprudence by greatly increasing plaintiffs' burden to prove redressability and by greatly reducing voters' right to claim listener standing.

Amici ask the Court to rule that *Renne* is authority for denying justiciability only where a statute's lack of history or mechanism of enforcement makes it doubtful that it ever has resulted in censorship in the past or ever is likely to do so in the future - *i.e.*, where the issue is not yet ripe.

Renne concerned §6(b) of the California Constitution, which prohibits political parties from endorsing or opposing candidates for non-partisan office, including all local offices, but which has no provisions for penalties, censorship or other enforcement mechanism.

In that case, §6(b) had been used by local officials as authority for censoring mention of party endorsements or affiliations from voter pamphlet candidate statements, which censorship could at least equally have been justified under California Elections Code §10012, challenged in *Mark*.

This combination of circumstances led the *Renne* majority to conclude that there was too little likelihood that §6(b), by itself, would result in censorship that would not occur anyway under §10012. As long as censorship attributable to §6(b) appeared to be a remote and speculative peril, and had neither the enforcement record nor enforcement mechanisms that would clarify its actual operation and effect (if any), the *Renne* majority concluded the issue was not yet ripe.

The *Renne* dissenters disagreed among themselves as to whether §6(b), as used in the particular case, was valid, but agreed that the issue of its validity, at least as used in that case, was ripe; and that the majority appeared to be inventing a new and unjustified redressability rule to the effect that an unconstitutional law cannot be challenged unless every other law that could possibly be used to the same effect, is also challenged in the same suit.

The majority gave no indication whether the dissents had accurately understood it as to its apparent creation of a new redressability principle.

The unclarity plainly results from the fact that the issue had not been litigated. At no time had the City, with its large staff of attorneys, ever thought to raise it; nor did the California Judges Association in its *amicus* brief in support of the City's position. The idea did not occur to the federal district court, nor to any judge on the original appeals court panel nor on the *en banc* court. The issue was not included in the question on which *certiorari* was granted, nor was it mentioned in either party's briefs, nor in any *amicus* brief.

When the issue was first brought up at oral hearing, the prudent way to avoid the predictable confusion would have been either to remand for a determination of redressability, or at least to have had the parties brief the issue.

At *en banc* hearing in the present case, Judge Rymer said bluntly: "In...Renne, the Supreme Court made noises which I find difficult to decipher..." (see *Mark* Cross-Petition at 4 and 8-A and *Corwin* Petition at I-24).

Though without the same frankness, the *en banc* ruling makes it apparent the rest of the 9th Circuit felt the same. That court voided §10012 without even addressing the City's *Renne*-redressability argument (the first question on which *certiorari* is asked in the *Corwin* Petition); and dismissed the challenges to §§ 10013.5, 3795 and 5025 as non-justiciable, with no explanation beyond a citation to *Renne* (an issue raised by the *Mark* Cross-Petition).

At the *en banc* hearing, as may be seen in the transcript reprinted with the Cross-Petition especially at 11-A, there were doubts whether the City's voter-pamphlet censorship continued to be an issue. As will be explained in the last part of this brief, *Amici* continue to be injured by voter-pamphlet deletions and threats of deletions.

Amici are associated in various ways with several ballot-qualified parties as well as campaigns for or against various ballot propositions. Since the *en banc* ruling, one was victim of a partly-successful censorship effort by Petitioners under the statutes at issue; another was victim of an unsuccessful attempt by them. Others are kept from campaigning for local office under their movement's chosen banner.

In addition, all the *amici* are denied equal access to a forum they are forced as taxpayers to subsidize. And all, as voters and readers, are denied the right to decide for themselves which claims and arguments to consider false, misleading, irrelevant or otherwise to be disregarded.

LOWER COURTS IN DISARRAY ON CONSTRUING *RENNE*

Renne has resulted in confusion among district courts and appellate panels within the 9th Circuit, as to what plaintiffs must show, to have standing for federal challenges to local laws abridging electoral-speech freedom.

Must an enforcement attempt be pending when the suit is filed? Is it enough if a law was enforced in the recent past? Or if an enforcement mechanism exists which authorities say they intend to use if plaintiffs violate the provision?

Do plaintiffs have to be subjected to civil or criminal proceedings before having standing to challenge a censorship law? If so, does a plaintiff gain standing if a proceeding is initiated against her while the suit is pending?

Do laws first have to be construed by state courts before federal courts can consider constitutionality challenges? Or is it enough if plaintiffs allege their desire to exercise their electoral speech or press rights in ways the challenged law now prohibits?

In four cases citing *Renne*, different judges or panels of judges have answered these questions differently.

In ***Thorsted v. Gregorie*** (W.D. WA 1994, __ F.Supp. __, No. C92-1763 WD, decided February 10, 1994, appeal pending), Judge William Dwyer allowed individual voters and an association of voters asserting a right to decide what candidates to support, to challenge a Washington State law imposing term limits on Congressional candidates, although the law had never been construed by the state courts, and will only take effect with the 1994 election. Judge Dwyer distinguished *Renne* as a case in which **"further opportunity for the state courts to interpret the statute might alter the question presented."**

In ***Committee to Prevent Municipal Bankruptcy v. Renne*** (N.D. Cal. 1994, No. C92-3689 CAL, decided January 20. 1994, appeal pending), Judge Legge reached exactly the opposite conclusion. In a suit challenging San Francisco

provisions imposing a combined $500 limit on contributions to a candidate directly and through independent committees, the court found lack of standing even though the ordinance in question had actually been violated by the plaintiffs during the 1992 election campaign. Judge Legge expressly relied on *Renne* to reach this conclusion.

In *SEIU v. FPPC* (1992) 955 F.2d 1312, a panel of the 9th Circuit rejected a *Renne*-based attack on the plaintiffs' standing, even though the state campaign contribution limits under challenge had not yet been enforced and had never been construed by the state courts.

In the instant case, a 9th Circuit *en banc* panel went to the opposite extreme. Although the challenged censorship statutes had repeatedly been enforced in the state courts and had been presented to the state appellate courts to construe (and given *no* narrowing construction), the court found a lack of a justiciable controversy as to three of the statutes, citing *Renne* as its sole authority, and giving no explanation (even as to why this didn't also apply to the other statute).

Which of these decisions are wrong? Which are right?

This needs to be answered, not only to clarify the prerequisites for standing to litigate the 1st-Amendment rights at issue, but also for the bottom line: to make it possible to stop use of the disputed statutes to abridge those rights.

THE STATUTES ABRIDGE *AMICI'S* POLITICAL RIGHTS

In a variety of ways, the four challenged statutes impose prior restraints abridging freedom of electoral press in a vital forum, thereby infringing *Amici*'s individual and associational political rights in various ways, sometimes severely.

Certiorari should be granted not only to clarify whether *Renne* greatly altered redressability or standing criteria, but also to allow review of the *en banc* dismissal of Cross-Petitioners' challenges to the statutes allowing judicial censorship of voter pamphlet statements if a judge is convinced the statement is false, misleading, irrelevant or otherwise inappropriate, even in the absence of any claim of intentional dishonesty or disregard for facts or relevancy.

As it stands, both the District Court ruling that these statutes are void, and the initial Appeals Court ruling that

they are valid, have disappeared into thin air, several years of litigation having ended in an unexplained dismissal based on lack of justiciability under *Renne*.

Renne was clearly based on lack of ripeness where it is doubtful what if any effect a provision has or whether it ever has been or is likely to be used to block any communication that wouldn't be blocked anyway.

Here there were all degrees of ripeness. There had been numerous censorship proceedings under specific authority of these statutes in recent years, including some decided shortly before the suit was filed, some pending when it was filed and some initiated shortly after it was filed, while it was pending in the District Court.

In addition, here a clear enforcement mechanism exists and Petitioners have stated their intent to continue using it, and have done just that. If these do not make a justiciable controversy, it is not clear what would.

Any theory that the issue might be moot is refuted by Petitioners' using the statutes immediately after the *en banc* decision, in a partly-successful effort to censor a statement by *amicus* Ventresca concerning a local ballot measure, in ***Wong v. Bd. of Supervisors (Ventresca)*** San Francisco Superior Court No. 9545, decided September 3, 1993 (appeal pending), in which Registrar Wong (successor to Petitioner Corwin), under Petitioner Renne's direction, sought deletion of over 90% of a 249-word ballot-argument largely consisting of criticism of the current Mayor.

The court denied almost all the deletions sought but did order changes to one sentence. This constitutes "abridging" the freedom of press that used to exist; when the First Amendment was enacted (and still when the Fourteenth was enacted, ultimately making the First binding on Petitioners), there was no way a judge could order changes in or even consider censoring any kind of publication criticizing public officials, on grounds that the opinions expressed were false, misleading, irrelevant or anything else.

Even in cases of libel or intentional fraud, courts could not issue injunctions or otherwise act to prevent publication of the criticism. Such was "prior restraint", the essence of the problem that had existed under the monarchy and the main evil intended to be prevented by the First Amendment guarantee of freedom of press.

Rather, civil or criminal proceedings could only occur *after* publication, when there would be adequate time to litigate such questions as fraud or defamation damages.

Even then, there was absolutely nothing courts could do against publication of *honest* criticism of public officials even if a judge found clear and convincing proof that the opinion or argument was false, misleading or irrelevant.

If the First Amendment now allows a judge to alter or delete one sentence in a criticism of the Mayor, it also allows him to do it to two sentences, or to all.

And if it allows it based on what one judge considers clear and convincing proof, then it allows it based on what another would *not* consider clear or convincing.

Even more recently, *amicus* Goland was victim of another censorship proceeding under these statutes. In ***Wong v. Bd. of Supervisors (Goland)***, San Francisco Superior Court No. 959812, decided April 8, 1994, Petitioners tried to get an entire ballot-argument deleted on the theory that its humor was off-color and therefore offensive, though no claim was or could be made that it was anywhere near obscene.

The court denied this request in entirety, but not before *amicus* Goland had been forced to obtain counsel to defend his right to equal access to the city voter-pamphlet.

Even though no deletions occurred, "censorship" did, in that the judge sat as censor, inspecting a political statement before publication to decide whether to let it be published.

While judicial approval is now required for any deletions, the First Amendment was not intended merely to require that political censorship be done only by judges.

One obvious problem is that in many cases censorship victims will prevail only on appeal, normally after the relevant election is over.

But even if the clear-and-convincing-proof standard made judges infallible, the Constitution protects false opinions as well as true ones. It also protects the voters' right to receive uncensored speech and press, so they can decide for themselves which claims and arguments to credit and which to reject as false or otherwise invalid.

Each censorship incident has involved a disagreement between a candidate or ballot-argument author, and the state Legislature and/or City officials, as to what is true, relevant or otherwise desirable for assisting voter decisions.

The most common specific issue has been the relevancy of a candidate's endorsement or other party affiliation, when the office sought is technically non-partisan.

For those who strongly identify with some party or some principle associated with one, this information is relevant even as to local offices, where candidates officially run as individuals rather than as party nominees.

Especially in the case of minor offices, candidates' names may not be well-known, and official endorsement or other partisan association may be the main if not only basis a voter has for deciding who to support (or oppose).

Also, *all* taxpayers subsidize the voter pamphlet. It is unequal if *some* are excluded from it based on their views or comments seeming false or otherwise inappropriate to some official, whether judge or otherwise (especially since taxpayers whose views are excluded still must subsidize publication of their opponents' views).

But this is especially harmful to candidates and ballot-measure supporters and opponents who are relatively less well-known or well-financed, and who therefore have less access to other publicity. One of the main purposes of voter pamphlets is to give the voters full access to all views, including of those who, through lack of fame or fortune, have less access to other mass media.

This is all the more harmful to dissenters, since minority opinions not only have less access to the mass media almost by definition, but also because they are the opinions that a judge would be most likely to conclude have been proved false or otherwise unworthy.

As party members, candidates and officials, *Amici*'s right to associate to petition for redress of grievances is abridged by actual and threatened deletions of party references from voter-pamphlet candidate statements.

Such deletions are the greatest burden to smaller and newer parties, the parties that can least bear it.

For instance, *Amici* Christman and Traynor's Green Party is California's newest ballot-qualified party and has not yet been able to elect its candidates. Much of the problem is the winner-take-all election system; many Green Party candidates have been elected in countries with proportional representation, which gives minorities the representation they don't get in most elections in the USA.

But a major added problem is the fact that parties can only nominate and run candidates for the relatively-major statewide offices. California state Senatorial districts are larger than Congressional districts; two Assembly districts have more people than the entire state of Wyoming.

The Green Party is experiencing the same problem the state's older Peace-&-Freedom and Libertarian parties have, in needing to start with the smallest, local offices, especially city councils, school boards and similar offices where more than one candidate is elected and it is possible to finish as low as fifth or sixth, and still win office.

Technically, it is literally impossible for California parties to campaign for such non-partisan offices. A number of members of *Amici* Evans and Feinland's Peace-&-Freedom Party have been elected to local offices, but since they have been elected as individuals and not as party nominees, their party hasn't reaped the credibility their successes merited.

Amici O'Brien and Valverde's Libertarian Party has had the identical problem. While other parties' candidates more often run on their personal record or on specific platforms, Libertarian campaigns generally focus on the single principle which gives their party its name; to deny them the right to identify their party is in effect to deny them the right to identify their viewpoint.

Concern about §6(b) and the censorship statutes at issue here, contributed to the party's decision to sponsor a local voter initiative in 1991, adopted by a 73% majority, declaring a San Francisco policy of opposition to censorship in the city voter-pamphlet and everywhere else.

It is, of course, possible for a local party organization to rally behind a candidate for non-partisan office. Although §6(b) of the state constitution forbids it, party committees sometimes make official endorsements for such offices, and have not been prosecuted for doing so.

But in the voter pamphlet, usually the most important forum of the campaign, mentions of party endorsement or partisan affiliation in candidate-statements are routinely censored by combined authority of §§ 6(b) and 10013.5, thus denying the voters' right to know what many consider the best reason to support or oppose a candidate.

The disadvantage can affect even large parties, such as *Amicus* Lee's Republican Party, a minority in San Francisco.

This led Cross-Petitioner Mark and three other leaders of the San Francisco Republican Party to join with Democratic Party leaders and others in filing the present suit.

Incumbents have great fund-raising and name-recognition advantages. Since few San Francisco Republicans have been elected in recent years, local incumbency advantages usually go to Democrats, whose supporters usually know who they are and what they stand for. Voters who might want to support another party or to split their ballots, often don't know the non-incumbent candidates or what they represent, partly because §10013.5 allows party affiliation to be deleted from the statements of candidates who consider it relevant.

Even members of *majority* parties are aggrieved by loss of the right to associate for political speech as a result of §6(b)'s ban on party endorsements for non-partisan office and §10013.5's authority for deleting such endorsements from candidate statements.

Not all majority-party candidates are well-known or well-funded. For San Francisco Democrats who are not well known, it would help to be able to cite the party's endorsement, and it is vital to at least mention party membership to the voters, most of whom usually don't vote for candidates they don't recognize to be Democrats.

And even incumbents and other top leaders of majority parties are also aggrieved by laws barring (or allowing censorship of) endorsements by their parties.

Party leaders devote themselves to party activism because they see support for a group with similar concerns as the best way to achieve their objectives. To prevent parties from speaking on some subjects is to abridge the rights of their leaders and members to speak collectively and associate peacefully to petition for redress of grievances.

This led San Francisco Democratic Party leader Geary, the Respondent in *Renne*, to join with others in filing the original challenge to §6(b).

It also led *Amici* Davis and Riordan's Democratic Party itself to file the successful challenge to a ban on parties endorsing in their own primaries, affirmed in ***Eu v. Democratic Party Central Committee*** (1989) 489 US 214.

In that case, the party was at least as much interested in their right to collectively *oppose* (LaRouche-backed) candidates as to *support* candidates.

Most importantly, *Amici* and other voters are missing information they want, and generally have no way to even know what they're missing. The voters' right to listener-standing may be the most urgent issue of the case.

CONCLUSION:

In 200 years, the Supreme Court has never approved prior restraint on publication of political opinions or claims on the basis that they were false or otherwise likely to be more persuasive than they deserved to be. See, *e.g.*, ***Near v. Minnesota*** (1930) 283 US 697.

Even as to libel or fraud, the First Amendment traditionally is taken only to allow *subsequent* sanctions, not court orders to prevent the initial publication.

Even subsequent sanctions on political libel or fraud can only be imposed after the accused has a right to a jury trial (and ordinarily to an appeal prior to imposition of penalty); and the accused must be shown to have made false statements that defamed or defrauded someone; and to have knowingly and intentionally disregarded the truth.

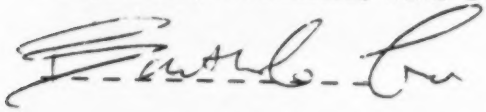
The fact that City voter pamphlets are subsidized by City taxpayers does not support the City's right to censor statements by those taxpayers; rather, it supports their right to uncensored access, equal with other taxpayers.

Nothing in *Renne* suggests that officials can now censor honest political debate based on the merits of the views or of the arguments supporting them.

But that decision, at least as construed by the *en banc* court in this case, has made it unclear under what conditions anyone still has a right to challenge such censorship.

For these reasons, *Amici* ask the Court to grant *Certiorari* on the Question proposed by Cross-Petitioners; and to clarify *Renne* regarding redressability and standing criteria.

Respectfully submitted, June 17, 1994.



Bartholomew Lee,
Attorney for Amici